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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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BEFORE THE COMMISSION

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

In the Matter of:)
)
Pacific Gas and Electric Co.)
)
(Diablo Canyon Power Plant Independent)
Spent Fuel Storage Installation))

Docket No. 72-26-ISFSI

PACIFIC GAS AND ELECTRIC COMPANY'S RESPONSE TO
PROPOSED CONTENTIONS

I. INTRODUCTION

This matter is presently before the Commission on remand from the Ninth Circuit Court of Appeals.¹ In accordance with the Commission's directions in CLI-07-11,² the NRC Staff prepared a supplemental Environmental Assessment ("EA") under the National Environmental Policy Act ("NEPA") — addressing the likelihood of a terrorist attack at the Diablo Canyon Independent Spent Fuel Storage Installation ("ISFSI") site and the potential consequences of such an attack. The supplemental EA was served on the parties on May 29, 2007.³

¹ See *San Luis Obispo Mothers for Peace v. NRC*, 449 F.3d 1016 (9th Cir. 2006).

² Memorandum and Order, CLI-07-11, February 27, 2007.

³ "Supplement to Environmental Assessment and Draft Finding of No Significant Impact Related to Construction and Operation of the Diablo Canyon Independent Spent Fuel Storage Installation," May 29, 2007 ("EA Supplement").

On June 28, 2007, the San Luis Obispo Mothers for Peace (“SLOMFP” or “Petitioner”) filed proposed contentions addressing the NRC Staff’s EA Supplement.⁴ In accordance with CLI-07-11, these new contentions must meet the standards for amended or late-filed contentions in 10 C.F.R. Part 2, as well as the normal standards in Part 2 governing admissibility of contentions.⁵ Pacific Gas and Electric Company (“PG&E”) — the licensee for the Diablo Canyon ISFSI — herein responds to the proposed contentions on the issue of admissibility.⁶

II. BACKGROUND

A. Standards for Admissibility of Contentions

To be admissible in NRC licensing proceedings under the applicable Subpart G rules of procedure, proposed contentions must satisfy 10 C.F.R. § 2.714(b)(2), which provides

⁴ “San Luis Obispo Mothers for Peace’s Contentions and Request for Hearing Regarding Diablo Canyon Environmental Assessment Supplement,” dated June 28, 2007, as corrected June 29, 2007 (“Proposed Contentions”).

⁵ CLI-07-11, slip op. at 3.

⁶ Because the notice of hearing in this matter was published on April 22, 2002 (67 Fed. Reg. 19,600), PG&E has concluded that the relevant rules of procedure (including those defining the time for responses to proposed contentions) are those in 10 C.F.R. Part 2, Subpart G as applicable at the time of the hearing notice. In amending Part 2 in January 2004, the Commission in the Statement of Consideration was explicit that the revised procedures would apply only to “proceedings noticed on or after the effective date [of the rule], unless otherwise directed by the Commission.” 69 Fed. Reg. 2181, 2182 (January 14, 2004). Moreover, the Commission stated that proceedings noticed before the effective date of the final rule will continue to be governed by the old Part 2 provisions, and that if a decision was on appeal within the Commission, or to a Court of Appeals, and the decision is remanded to the NRC for further action, the remanded proceeding will continue to be governed by the old Part 2 provisions. *Id.* at 2215. Accordingly, Part 2 citations herein are to the 2002 edition of the Code of Federal Regulations. Beyond the issue of admissibility of contentions, the prior proceedings on this matter were held under the special hybrid hearing procedures in 10 C.F.R. Part 2, Subpart K. These Subpart K rules continue to apply to hearings on spent fuel storage matters, where invoked by a party. *Id.* at 2222. If contentions are admitted, PG&E requests that the hearing be held under Subpart K procedures.

that each contention “must consist of a specific statement of the issue of law or fact to be raised or controverted.” Additionally, each contention must be accompanied by:

- (i) A brief explanation of the bases of the contention.
- (ii) A concise statement of the alleged facts or expert opinion which support the contention and on which the petitioner intends to rely, together with references to those specific sources and documents of which the petitioner is aware and on which the petitioner intends to rely to establish those facts or expert opinion.
- (iii) Sufficient information to show that a genuine dispute exists with the applicant on a material issue of law or fact. This showing must include references to the specific portions of the application that the petitioner disputes and the supporting reasons for each dispute.

10 C.F.R. § 2.714(b)(2). *See Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, & 3), CLI-99-11, 49 NRC 328, 333 (1999); *Yankee Atomic Elec. Co.* (Yankee Nuclear Power Station), CLI-96-7, 43 NRC 235, 248-49 (1996).

The rules on the admission of contentions require precision in the contention pleading process and establish an evidentiary threshold more demanding than a mere pleading requirement. The rules provide that if the contention and supporting material fail to demonstrate a genuine issue as required by Section 2.714(b)(2), the presiding officer (in this case, the Commission) must refuse to admit the contention. 10 C.F.R. § 2.714(d)(2)(i). *See also Ariz. Pub. Serv. Co.* (Palo Verde Nuclear Generating Station, Units 1, 2, & 3), CLI-91-12, 34 NRC 149, 155 (1991) (*citing* Final Rule, Rules of Practice for Domestic Licensing Proceedings — Procedural Changes in the Hearing Process, 54 Fed. Reg. 33,168, 33,171 (Aug. 11, 1989)).

A contention must also be rejected when, even if proven, it “would be of no consequence in the proceeding because it would not entitle the petitioner to relief.” 10 C.F.R. § 2.714(d)(2)(ii). *Yankee*, CLI-96-7, 43 NRC at 249 (*citing Sacramento Mun. Util. Dist.* (Rancho Seco Nuclear Generating Station), CLI-93-3, 37 NRC 135, 142 (1993)). Similarly,

under longstanding Commission precedent, proposed contentions must fall within the scope of the issues set forth in the notice of hearing. See *Vt. Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), LBP-90-6, 31 NRC 85, 91 (1990) (citing *Pub. Serv. Co. of Ind., Inc.* (Marble Hill Nuclear Generating Station, Units 1 & 2), ALAB-316, 3 NRC 167, 170 (1976).

B. Additional Standards for Late-Filed Contentions

The requirements for late-filed contentions are set forth in 10 C.F.R. § 2.714(a)(1)(i)-(v). These criteria include a showing of good cause for failure to file previously; the availability of other means by which the petitioner's interests will be protected; the extent to which petitioner's participation may reasonably be expected to assist in developing a sound record; the extent to which petitioner's interest will be represented by existing parties; and the extent to which petitioner's participation will broaden issues or delay the proceeding.

The first factor, whether good cause exists to allow the late-filed contentions, is entitled to the most weight. *State of New Jersey* (Department of Law and Public Safety), CLI-93-25, 38 NRC 289, 295 (1993). Absent a showing of good cause, the petitioner must make a compelling showing that the remaining four factors warrant admission of the late-filed contentions. *Id.* at 296; *Commonwealth Edison Co.* (Braidwood Nuclear Power Station, Units 1 and 2), CLI-86-8, 23 NRC 241, 244 (1986). However, findings favorable to the petitioner on some or all of the remaining four factors need not outweigh the effect of inexcusable tardiness. *Public Service Co. of New Hampshire, et al.* (Seabrook Station, Units 1 and 2), LBP-89-04, 29 NRC 62, 70 (1989), citing *Nuclear Fuel Services, Inc.* (West Valley Reprocessing Plant), CLI-75-4, 1 NRC 273, 275 (1975). The party seeking admission of its late-filed contentions bears the burden of showing that a balancing of the five factors weighs in favor of admitting the late-filed

contentions. *See Baltimore Gas and Electric Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-25, 48 NRC 325, 347 n.9 (1998).

Under longstanding practice, contentions must rest on the *license application*, not on NRC Staff reviews. *See Calvert Cliffs*, CLI-98-25, 48 NRC at 349-50; *Duke Energy Corp.*, CLI-99-11, 49 NRC at 336-39. In particular, the Commission held in these cases that a Request for Additional Information (“RAI”) or an applicant’s RAI response do not create a brand new day in a proceeding and a new opportunity for proposing contentions, because contentions must be based on the application itself. Analogously, a contention cannot simply be based on a supplemental EA if the contention could have been drafted based on the original application and environmental report.

III. DISCUSSION

Contention 1: Failure to Define Terms, Explain Methodology or Identify Scientific Sources

This proposed contention alleges that the NRC Staff’s EA Supplement “does not comply with NEPA or 40 C.F.R. § 1502.24 because it fails to describe the methodologies used by the NRC Staff or to provide the underlying data on which it relied.” Proposed Contentions, at 4. The contention asserts that the EA Supplement fails to define terms or explain methodology in eight separate respects. *Id.* at 5-8. Separately, the contention argues that the EA Supplement is inadequate because it fails to reference sources of scientific data used in the assessment. *Id.* at 9-10. As for relief, SLOMFP “seeks identification and access to any security studies or other data relied on by the NRC in reaching its conclusion that the environmental impacts of the proposed spent fuel storage facility are insignificant.” *Id.* at 10. In total, however, this proposed contention fails to establish any specific litigable issue and seeks relief that is inconsistent with the Commission’s direction in this case in CLI-07-11.

The proposed contention is merely a truism: the EA Supplement does not disclose all of the NRC's security-sensitive information. That is what the Commission intended. It is well-settled that NEPA must yield where an agency cannot comply with both NEPA and another statutory duty. *Flint Ridge Development Co. v. Scenic Rivers Ass'n*, 426 U.S. 776, 787 (1976). More specifically, NEPA's disclosure requirement is inapplicable where a statute expressly prohibits NEPA review or a fundamental conflict of statutory duty exists between NEPA and another statute. *Id.*; see also 40 C.F.R. § 1500.6. In the present case, the NRC has a duty under the Atomic Energy Act to protect the common defense and security — including by protecting security-sensitive information from public disclosure. Access to security-sensitive studies or other data underlying the EA Supplement should only follow identification and admission of a genuine, litigable contention and should be limited to information material to that contention.

The context of the present proceeding is also essential to defining its proper scope and procedures. The Court of Appeals held that the NRC Staff's prior EA was inadequate, and remanded for further agency proceedings, because the EA did not address the issue of potential terrorist attacks. Importantly, the Court specifically acknowledged the NRC's concerns regarding security risks inherent in addressing terrorism issues. The Court — citing *Weinberger v. Catholic Action of Hawaii*, 454 U.S. 139 (1981) — recognized that “security considerations may permit or require modification of some of the NEPA procedures.”⁷ The Court even suggested, by way of example, that a process in which the public contributes information to the decision-making process would fulfill both the information gathering and the public participation

⁷ *San Luis Obispo Mothers for Peace*, 449 F.3d at 1034.

functions of NEPA. As in *Weinberger*, information could be submitted and factored into the decision-making, even if the NEPA results are not publicized or adjudicated.⁸

Consistent with the substantial procedural discretion afforded by the Court of Appeals, the Commission's direction to the NRC Staff in CLI-07-11 was for the Staff, to the extent practicable, to base its supplemental EA on information already in the public record and to make public as much of its revised environmental analysis as feasible. CLI-07-11, slip op. at 4. The Commission, however, specifically recognized that "it may prove necessary to withhold some facts underlying the Staff's findings and conclusions." *Id.* The Commission did not provide for potential petitioners to have access to security-sensitive information prior to pleading contentions. In this context, SLOMFP's proposed Contention 1 amounts to no more than a challenge to the process put in place by the Commission. The proposed contention establishes no specific issue for hearing.

SLOMFP seeks access to "security studies or other data" relied upon by the Staff, even if under "protective measures." Proposed Contentions, at 10. However, this step is not required to meet the explicit scope of the Ninth Circuit remand or to meet the requirements of NEPA. The focus of the remand was for the NRC to address the views of SLOMFP.⁹ Accordingly, if SLOMFP or its adviser, Dr. Thompson, have specific input or views on the likelihood of a terrorist attack at the DCPD ISFSI, or even the consequences of such an attack, SLOMFP should clearly assert that position in a specific factual contention which can be considered in the administrative process. In proposed Contention 1 SLOMFP cross-references

⁸ *Id.*

⁹ See, e.g., *San Luis Obispo Mothers for Peace*, 449 F.3d at 1030 ("the NRC failed to address Petitioners' factual contentions that licensing the Storage Installation would lead to or increase the risk of a terrorist attack . . .").

proposed Contention 3 (*see, e.g.*, Proposed Contentions, at 5), but otherwise fails to assert any specific factual contention with respect to either the likelihood of a terrorist attack or the consequences of such an attack. SLOMFP therefore fails to establish any specific dispute for litigation. The mere fact that the EA Supplement does not disclose all of its underpinnings would not establish grounds for access to the information relied upon by the NRC Staff. The proposed contention should be rejected in accordance with 10 C.F.R. § 2.714(d)(2)(ii).

Proposed Contention 1 is also based upon a faulty view of the standard for assessing an EA. SLOMFP argues that the agency must provide “hard data” relied upon by the agency as a basis for judicial review of the agency action. Proposed Contentions, at 3-4. This approach incorrectly presumes that a court of appeals in a NEPA context would review every supporting study and methodology, to independently validate the agency’s conclusion. In fact, the standard of review for an agency’s decision not to prepare an EIS is an “arbitrary and capricious” standard, with due deference to an agency’s expertise. *See Greenpeace Action v. Franklin*, 14 F.3d 1324, 1331-33 (9th Cir. 1992) (finding that an agency is entitled to rely on its own scientific opinion of data); *see also National Resources Defense Council v. Morton*, 458 F.2d 827, 838 (D.C. Cir. 1972) (“So long as the officials and agencies have taken the ‘hard look’ at environmental consequences mandated by Congress, the court does not seek to impose unreasonable extremes or to interject itself within the area of discretion of the executive as to the choice of the action to be taken.”).¹⁰ In the bases for proposed Contention 1, SLOMFP specifically asserts a number of examples of alleged failures to define terms, explain methodology, or reference sources. However, in the light of an appropriate standard of review,

¹⁰ *See also Ecology Center, Inc. v. U.S. Forest Service*, 451 F.3d 1183, 1190 (10th Cir. 2006) (petitioner unpersuasively attempted to equate the lack of a “hard data” with a lack of “hard look;” because the Forest Service had conformed with NEPA’s procedural requirements, the court would not “second-guess the wisdom of the ultimate decision.”).

and given the security-sensitive nature of the issue, the alleged “inadequacies” of the EA Supplement do not raise litigable issues. On their face, these bases do not establish that the agency has not taken the hard look required by NEPA.

SLOMFP faults the EA Supplement for failing to identify plausible or credible attack scenarios. Proposed Contentions, at 5. However, the purpose of the EA Supplement is not to identify whether a terrorist attack will take one form or another. The purpose is to assess whether an attack must be considered and, if so, the environmental impacts of an attack. The NRC Staff’s EA Supplement explains that the Staff has made such an assessment, concluding that the likely dose from plausible scenarios is below 5 rem — which is a result bounded by the discussion of design-basis accidents in the original ISFSI EA. The various attack scenarios were not addressed in detail in the EA Supplement, but a framework for the Staff’s analysis is provided. The EA Supplement groups threat scenarios into two categories: (1) a 9/11-type attack and (2) a ground assault with expanded adversary characteristics consistent with the Design Basis Threat (“DBT”). If SLOMFP has views on the results of such events, it needs to plead those views to establish an admissible contention. Proposed Contention 1 does not do that.

Similarly, SLOMFP argues that the analytical steps are “poorly described.” Proposed Contentions, at 6. This basis likewise fails to present any genuine issue. The four-step analysis methodology is summarized in the EA Supplement. The NRC evaluated potential consequences and determined that the consequences are not significant. To justify litigation, or even further NRC Staff evaluation in response to a public comment, it is a petitioner’s burden to affirmatively show plausible events that would result in significant off-site consequences.

Moreover, in this and other proposed contentions, SLOMFP cites the regulations of the Council on Environmental Quality (“CEQ”) such as 40 C.F.R. § 1502.24. *See, e.g.,*

Proposed Contentions, at 4. However, CEQ regulations do not apply directly to the NRC to the extent the agency has not expressly adopted those regulations. *Limerick Ecology Action v. U.S. Nuclear Regulatory Commission*, 869 F.2d 719, 743 (3d Cir. 1989). Likewise, Section 1502.24 by its terms relates to an Environmental Impact Statement, not an EA.

Other alleged deficiencies are simply trivial. SLOMFP faults the NRC Staff for failing to explain the meaning of “plausible.” Proposed Contentions, at 5. However, there is no legal need under NEPA for the NRC Staff to define terms that are used in their ordinary sense.¹¹ SLOMFP claims that the supplement is inadequate because of a failure to describe analyses performed “for the specific purpose” of complying with NEPA. *Id.* at 6. But no basis is provided for the supposition that an agency must perform “new” analyses to specifically comply with NEPA. Moreover, the portion of the contention that states that the EA “fails to demonstrate that the NRC considered the wider scope of scenarios” than the DBT (Proposed Contentions, at 6) is factually incorrect. The EA states that it considered a large aircraft impact similar to 9/11. This scenario is beyond the DBT. Lastly, SLOMFP asserts that the NRC Staff has failed to link the AEA to NEPA (*id.* at 8), and failed to explain how security assessments were factored into NEPA (*id.*). It is not at all clear what further analysis or disclosure would need to be made in this regard to allow a reviewing court to conclude that the agency evaluated the remanded issue consistent with NEPA. SLOMFP simply does not explain how its complaints raise a litigable issue with the EA Supplement.

For these reasons, SLOMFP has not shown in its bases for proposed Contention 1 a genuine dispute with respect to a material issue of law or fact as required by 10 C.F.R. §§

¹¹ “Plausible” means superficially fair, reasonable, or valuable, but often specious. WEBSTER’S NEW COLLEGIATE DICTIONARY 902 (9th ed. 1983).

2.714(b)(2)(iii) and 2.714(d)(2)(i). It has also failed to show that it is entitled to any relief as required by 10 C.F.R. § 2.714(d)(2)(ii).

Contention 2: Reliance on Hidden and Unjustified Assumptions

Proposed Contention 2 is merely a variant of proposed Contention 1. It asserts that the EA Supplement fails to satisfy NEPA because “the NRC’s decision not to prepare an EIS is based on hidden and unjustified assumptions.” Proposed Contentions, at 10. The Petitioner cites case law for the unremarkable proposition that an agency’s reliance on misleading or unjustified assumptions would violate NEPA. However, as with proposed Contention 1, a meaningful contention in an adjudicatory process — particularly this one, as framed by the Court of Appeals and the Commission — needs to be premised on some specific factual position of the Petitioner on a risk created by licensing the ISFSI. Here, the contention on its face fails to identify that any assumptions in the EA Supplement are “misleading” or “unjustified.” Indeed, the proposed contention identifies only two factual issues, neither of which is well-supported and neither of which raises an admissible issue.

First, the contention alleges that the NRC has excluded consequences other than early fatalities, and characterizes this as “absurd.” Proposed Contentions, at 11. SLOMFP cites the attached report from Dr. Thompson (“Thompson Report”) for a discussion of increased cancers and illnesses as a result of a terrorist event. *Id.* The proposed contention, however, does not accurately characterize the EA Supplement. In the EA Supplement the NRC Staff bases its conclusion of no significant environmental impact on an assessment of dose — 5 rem or below to the nearest affected resident as a result of the most severe plausible threat scenarios. EA Supplement, at 7. This maximum dose coincides with the design basis accident limit specified in 10 C.F.R. § 72.106(b). This dose standard is not directly correlated to either early fatalities or latent fatalities. However, there is no regulatory basis (or basis in NEPA) for an assertion that

such a correlation is necessary. Dose is a commonly-used and acceptable metric for off-site accident consequences (*see, e.g.*, 10 C.F.R. § 72.106(b)). Moreover, it is clear that the NRC Staff does not view a 5 rem dose as one that would involve significant environmental or health consequences. In this regard SLOMFP fails to state a contention that would entitle it to any relief. The proposed contention should not be admitted, in accordance with 10 C.F.R. § 2.714(d)(2)(ii).

Second, SLOMFP asserts that the EA Supplement “appears to assume that the environmental impacts of an attack on a spent fuel storage cask would be reduced to the point of insignificance by unspecified emergency planning upgrades.” Proposed Contentions, at 11. However, this assertion mischaracterizes the EA Supplement. The EA Supplement states: “In some situations, emergency planning actions could provide an additional measure of protection to help mitigate the consequences, in the unlikely event that an attack were attempted at the Diablo Canyon ISFSI.” EA Supplement, at 7. This is undeniably a true statement. Without mentioning or relying on any “upgrades,” the NRC Staff in the EA Supplement has qualitatively credited dose mitigation that could be achieved by exercising the existing Diablo Canyon emergency plan (including, for example, sheltering, evacuation, ingestion pathway measures). SLOMFP’s assertion does not establish either a specific or a genuine issue in dispute.

In sum, proposed Contention 2 does not raise any genuine dispute or demonstrate that there is an administrative remedy available to the Petitioner.

Contention 3: Failure to Consider Credible Threat Scenarios With Significant Environmental Impacts

SLOMFP in this proposed contention asserts that “CEQ regulation 40 C.F.R. § 1502.22(b)(3) requires the NRC to consider low-probability environmental impacts with catastrophic consequences, if those impacts are reasonably foreseeable.” Proposed Contentions,

at 12. The contention asserts, in essence, that the EA Supplement is deficient because it has not identified any scenarios that could cause significant environmental damage and therefore it must have excluded the attack scenarios considered by Dr. Thompson. According to Dr. Thompson, his scenarios are plausible and would result in greater consequences than those calculated by the NRC. SLOMFP seeks a “full-scale” Environmental Impact Statement (“EIS”) discussing the scenarios. *Id.* at 14.

At the outset, SLOMFP misstates the language of 40 C.F.R. § 1502.22(b)(3), which applies to EISs (not EAs) and which does not apply directly to the NRC (as noted above). The regulation requires the agency to include a “summary” of existing credible scientific evidence when information relevant to reasonably foreseeable significant adverse impacts is not available (*i.e.*, because the overall costs of obtaining it are exorbitant or the means to obtain it are not known). Here, because the NRC Staff has concluded that there are no significant impacts from reasonably foreseeable scenarios, Section 1502.22 does not apply.¹² *See Ground Zero Center for Non-Violent Action v. United States Dep’t of the Navy*, 383 F.3d 1082, 1090-1091 (9th Cir. 2004) (the Court of Appeals rejected an assertion that the CEQ regulations required the Navy to assess “impacts with catastrophic consequences, even if their probability of occurrence is low,” where the Navy had made a detailed study of the risk of accidental explosion of Trident missile and determined the risk to be remote). Accordingly, the proposed contention lacks a valid legal basis.

In any event, the proposed contention, citing the Thompson Report at pages 33-37, focuses on penetration of the storage canister and use of an incendiary device to ignite the

¹² Specifically, the NRC Staff determined that the “probability of a malevolent act against an ISFSI that results in a significant radiological event” is “very low” and concluded that there is “high assurance that substantial environmental impacts will be avoided and thereby reduced to a non-significant risk level.” EA Supplement, at 6, 8.

zirconium cladding of the spent fuel. Proposed Contentions, at 13. The contention further asserts that this could be accomplished by a relatively small group of attackers (*id.*); such an attack could lead to penetrations of several canisters and zirconium combustion in several canisters (*id.*); and that dispersion of cesium-137 will render uninhabitable about 7,500 square kilometers of land (*id.*). As such, the proposed contention simply presumes an attack on the ISFSI and asserts that the consequences of a *successful* scenario of the type described above would be significant. The proposed contention does not address the *likelihood* of a successful attack, particularly in light of the security measures and design requirements applicable to ISFSIs. In contrast, the NRC Staff's analyses, which "have been taken without regard to the probability of an attack," address this point directly by determining that the probability of a *successful attack* is "very low." EA Supplement, at 6. As discussed further below, neither NEPA nor the Ninth Circuit's remand decision compels the NRC to litigate — to some definitive conclusion — the question of the likelihood of success of Dr. Thompson's scenario. Diversion of agency attention to matters that can never be addressed conclusively is fundamentally inconsistent with Congress's plan for fostering rationality in administrative decisionmaking through NEPA.¹³

Suffice it to say, the NRC has established physical security requirements precisely intended to protect against radiological sabotage of the type posited by Dr. Thompson. The physical security requirements require defensive strategies that will be applied to the Diablo

¹³ 42 U.S.C. § 4332(A); *see also* Sidney A. Shapiro and Robert L. Glicksman, RISK REGULATION AT RISK: RESTORING A PRAGMATIC APPROACH at 126 (“[W]hile NEPA seeks to enhance the rationality of agency decision making by fostering consideration of potential adverse environmental consequences, and their relationship to anticipated project economic and social benefits, its implementation reflects a recognition that agencies face limits in the degree to which they can engage in that kind of analytical endeavor.”).

Canyon ISFSI to address the adversaries the NRC requires licensees to consider, based upon current threat information and public comments.¹⁴ If the NRC considered greater threats to be anything other than speculative, it would presumably re-define the minimum level of security. Based on its own threat assessment and regulatory requirements, it is fair to conclude that the NRC does not consider the attack scenarios alluded to by Dr. Thompson, or at least successful ones, to be credible or therefore “reasonably foreseeable.” Thus, further assessments of consequences are not necessary.¹⁵

In the EA Supplement the NRC Staff states that it *has* considered a range of ground and air assaults, including scenarios that exceed the DBT. Implicitly, it is clear that the NRC Staff has concluded that scenarios such as those proffered by Dr. Thompson are remote and need not be considered or are bounded by the estimate of dose consequences of 5 rem. The Commission has held that the NRC hearing process does not serve to “fly speck” the agency’s

¹⁴ The Commission recently amended its DBT rule, reflecting consideration of twelve factors identified in Section 651(a) of the Energy Policy Act of 2005, including the potential for attack on facilities by multiple coordinated teams of a large number of individuals; the potential for suicide attacks; the potential for water-based and air-based threats; and the potential use of explosive devices of considerable size and other modern weaponry. *See* 72 Fed. Reg. 12705 (March 19, 2007).

¹⁵ Dr. Thompson also cites NUREG-0575, “Final Generic Environmental Impact Statement on Handling and Storage of Spent Light Water Power Reactor Fuel” (August 1979). In this report the NRC evaluated possible environmental impacts of sabotage at independent spent fuel storage installations. NUREG-0575, Section 5.2.1. The NRC Staff stated that “the possibility exists that potential saboteurs may be capable of overcoming the inherent protection and engineered safety features in an attempt to create a radiological hazard. For this reason, NRC regulations include requirements for the physical protection of spent fuel against sabotage [footnote omitted].” *Id.* at 5-3. It seems that one could always hypothesize a scenario that would exceed the required defensive capability, regardless of the size and depth of that capability. The goal of NEPA (and of the CEQ regulations) is not to reward fertile imaginations with a recitation of impacts the impossibility of which has not been proven, but to assure that essential information is provided to decisionmakers. To hold otherwise would compel an assumption of a “worst case” scenario and an analysis of the consequences. Such an approach under NEPA has been rejected by the Supreme Court. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 354 (1989).

NEPA documents or to simply “add details or nuances” to the NEPA documents. *System Energy Resources, Inc.* (Early Site Permit for Grand Gulf ESP Site), CLI-05-4, 61 NRC 10, 13 (2005), citing *Hydro Resources Inc.* (P.O. Box 15910, Rio Rancho, NM 87174), CLI-01-4, 53 NRC 31, 71 (2001). Moreover, the courts have stated many times that NEPA mandates procedural steps, not particular substantive results or outcomes. As noted previously, an agency’s decision not to prepare an EIS is subject to the high “arbitrary and capricious” standard of review. *Greenpeace Action v. Franklin*, 14 F.3d at 1332, citing *Marsh v. Oregon National Resources Council*, 490 U.S. 360 at 378 (1989) (“[w]hen specialists express conflicting views, an agency must have discretion to rely on the reasonable opinions of its own qualified experts even if, as an original matter, a court might find contrary views more persuasive”). Similarly, a disagreement among experts or in the methodologies employed is generally not sufficient to invalidate an EA. See, e.g., *Committee to Preserve Boomer Lake Park v. Dept. of Transportation*, 4 F.3d 1543, 1553 (10th Cir. 1993) (“Courts are not in a position to decide the propriety of competing methodologies . . . but . . . should determine simply whether the challenged method had a rational basis and took into consideration the relevant factors.”); *Friends of Endangered Species, Inc. v. Jantzen*, 760 F.2d 976, 986 (9th Cir. 1985) (“NEPA does not require that we decide whether an [environmental assessment] is based on the best scientific methodology available, nor does NEPA require us to resolve disagreements among various scientists as to methodology.”). Accordingly, there is no showing that further litigation is necessary.¹⁶

¹⁶ In NUREG-1437, “Generic Environmental Impact Statement for License Renewal” (December 1995), the NRC discussed impacts from internally initiated events at power reactors. The NRC wrote (at 5-17) that “[s]evere accidents initiated by external phenomena such as tornadoes, floods, earthquakes, fires, sabotage have not traditionally been discussed in quantitative terms” in NRC environmental reviews. With respect to sabotage, the NRC further wrote (at 5-18):

For similar reasons, a balancing of the late-filed contention factors does not weigh in favor of admitting proposed Contention 3. In particular, given the uncertainty inherent in assessing the likelihood of a terrorist attack and the lack of a means to reliably quantify the likelihood of an attack, Petitioners (and their experts) are unlikely to assist in the development of a meaningful record in this proceeding. SLOMFP and Dr. Thompson point to no particular expertise in threat assessment — an area where the Federal government will certainly have access to greater information than private parties. Moreover, conducting a hearing on the precise makeup of theoretical scenarios for attacking an ISFSI would not assist in assessing the unquantifiable risk of a terrorist attack. Litigation of the sort requested by the Petitioners would quickly devolve into speculation over imaginary attacks, which would not contribute useful information to the NRC's decision making process. The proposed Contention 3 would also broaden the issues in the proceeding beyond the environmental impacts of the ISFSI into areas that are already addressed by other NRC regulations, such as NRC security requirements and ISFSI dry cask designs. In the same way, other means are available to protect the Petitioners' interests, including, for example, participating in security-related rulemakings or commenting on dry cask storage Certificates of Compliance rulemakings. As a result, the late-filed factors weigh against admitting proposed Contention 3.

The regulatory requirements under 10 CFR Part 73 provide reasonable assurance that the risk from sabotage is small. Although the threat of sabotage events cannot be accurately quantified, the Commission believes that acts of sabotage are not reasonably expected. Nonetheless, if such events were to occur, the Commission would expect that resultant core damage and radiological releases would be no worse than those expected from internally initiated events.

A similar logic applies to the present issue, and further litigation of the qualitative likelihood of an attack at the Diablo Canyon ISFSI would not be productive.

The Commission may appropriately take the input from the Petitioner on the specific issue in proposed Contention 3, and assure through the NRC's normal NEPA process that the input is considered in a final NEPA document. This is consistent with the Ninth Circuit discussion of the procedures that the NRC could employ on remand. *See San Luis Obispo Mothers for Peace*, 449 F.3d at 1034, *citing Dept. of Transp. v. Pub. Citizen*, 541 U.S. 752, 768 (2004) (discussing application of NEPA's requirements on remand "in light of the two purposes of NEPA: first, ensuring that the agency will have and will consider detailed information concerning significant environmental impacts; and, second, ensuring that the public can both contribute to that body of information, and can access the information *that is made public*") (emphasis added). Obviously, through that process any additional input from parties such as PG&E and the NRC Staff could also be incorporated into the final record of decision. However, no private parties have access to the complete range of threat information available to the government. The NRC's reasoned determination as to whether the scenario identified by Dr. Thompson must be considered in light of the current threat environment — and, if so, the realistic consequences — are determinations entitled to great deference. The Staff's assessment of Dr. Thompson's input will serve NEPA's procedural mandate, without dictating results or outcomes and without protracted litigation of issues that are not amenable to a definitive conclusion.

*Contention 4: Failure to Address National Infrastructure Protection Plan*¹⁷

In this proposed contention, SLOMFP asserts that the EA fails to comply with NEPA because it "fails to address homeland-security strategy, the principles of protective deterrence, or the opportunities that the NIPP has identified for incorporating protective features

¹⁷ U.S. Department of Homeland Security, NATIONAL INFRASTRUCTURE PROTECTION PLAN (2006) ("NIPP").

into the design of infrastructure elements.” Proposed Contentions, at 14. More particularly, it asserts that the EA does not identify the NIPP or its officials as resources or individuals consulted under 10 C.F.R. § 51.30(a)(2). *Id.* at 15. This proposed contention is inadmissible because it fails to state any claim that would entitle SLOMFP to regulatory relief.

Initially, NEPA is an environmental statute that requires consideration of the environmental impacts of Federal actions; NEPA does not impose regulatory obligations beyond those of an agency’s organic statute. *Gage v. AEC*, 479 F.2d 1214, 1221 n.19 (D.C. Cir. 1973). Neither NEPA nor the NRC’s Part 51 regulations mentions NIPP, much less mandates that the NRC address the NIPP or consult with NIPP officials in preparing an environmental assessment.

The NIPP itself also does not impose any obligation on the NRC. The NIPP merely provides a “framework” for the “cooperation that is needed to develop, implement, and maintain a coordinated national effort” and provides the “mechanisms for identifying critical assets, systems, networks, and functions; understanding threats; assessing vulnerabilities and consequences; prioritizing protection initiatives and investments based on costs and benefits so that they are applied where they offer the greatest mitigation of risk; and enhancing information-sharing mechanisms and protective measures.” NIPP, at 8. The NIPP imposes no obligations on agencies such as the NRC and, indeed, applies “as appropriate and consistent with their own agency-specific authorities, resources, and programs.” *Id.* at iii-iv. Because the NIPP imposes no legal or regulatory obligation on the NRC, the proposed contention, even if admitted, would not entitle petitioner to relief.

As a practical matter, it appears, based on reading Dr. Thompson’s report, that the basic principles of the NIPP have in fact been incorporated into NRC requirements — that is, a strategy of physical protection of a critical infrastructure facility. Dr. Thompson’s report notes

that the NIPP identifies three purposes of measures to protect critical infrastructure and key resources: (i) deter the threat; (ii) mitigate vulnerabilities; and (iii) minimize consequences associated with an attack or other incident.¹⁸ Thompson Report, at 11-12. Even a cursory review of the EA Supplement shows that the NRC has taken measures to address each type of protective strategy mentioned by Dr. Thompson. The EA Supplement discusses the general and ISFSI-specific security measures and requirements (Section 3.0), the robust cask design requirements (Section 4.0), and actions that could mitigate the possible consequences of an attack (Section 4.0). Thus, even if the NIPP had some applicability to the Diablo Canyon ISFSI, Petitioners have not provided evidence to demonstrate a genuine issue with respect to the proposed ISFSI.

For all of these reasons, the proposed contention should be rejected as inadmissible under 10 C.F.R. § 2.714(d)(2)(ii).

Contention 5: Failure to Consider the Vulnerability of ISFSI in Relation to the Entire Diablo Canyon Spent Fuel Storage Complex

This contention argues that the EA Supplement violates NEPA because it does not address the “significant cumulative impacts” of the Diablo Canyon ISFSI in concert with the existing high density spent fuel pool storage at the power plant. Proposed Contentions, at 15. This contention is a clear attempt to bootstrap the previously licensed wet storage at Diablo Canyon into this licensing proceeding related to dry storage at the ISFSI. SLOMFP argue that the NRC Staff should prepare an EIS that considers “cumulative impacts” and that “examines, as a mitigative measure, the use of the ISFSI to reduce the risk of a pool fire by lowering the

¹⁸ To the extent that SLOMFP is arguing that the NIPP supersedes or augments the NRC’s existing security regulations or dry cask design requirements, the contention impermissibly challenges NRC regulations as well. *Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation)*, LBP-98-7, 47 NRC 142, 179, *aff’d on other grounds*, CLI-98-13, 48 NRC 26 (1998).

density of fuel assemblies in the Diablo Canyon spent fuel storage pools.” *Id.* at 16. This contention is inadmissible for several, independent reasons.

First, as a threshold matter, the ISFSI is licensed under Part 72 and the Part 50 power plant is not at issue in this proceeding. As observed above, contentions that concern matters outside the scope of the proceeding, as defined by the notice of hearing or opportunity for hearing, must be denied. The notice of opportunity for hearing for this proceeding indicated that at issue is PG&E’s application for a Part 72 license to possess spent nuclear fuel and other radioactive materials associated with a dry cask storage system at an ISFSI. *See* 67 Fed. Reg. 19,600 (April 22, 2002). Environmental impacts regarding spent fuel pool fires are, on their face, beyond the scope of this licensing proceeding. In this regard, SLOMFP has not provided evidence to suggest that the environmental impacts of spent fuel pool accidents are relevant to this ISFSI licensing proceeding. Without such a showing, SLOMFP has failed to provide any basis for its contention that satisfies the requirements of Section 2.714(b).

Second, this contention is not timely. SLOMFP previously in this proceeding raised issues related to high density storage in the spent fuel pools and the risk of spent fuel pool fires at Diablo Canyon. SLOMFP also raised issues regarding alternatives to spent fuel pool storage. Those proposed contentions were rejected as inadmissible. *See Pacific Gas and Electric Co. (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation)*, LBP-02-23, 56 NRC 413, 450-451 (2002). In its proposed contention, SLOMFP again raise issues regarding high density storage in the spent fuel pool and alternatives. Proposed Contentions, at 15. Other than the fact that the EA Supplement has now issued — one that still declines to address spent fuel pool storage issues in the context of the present ISFSI licensing action — this

contention is not based on any new information. SLOMFP has therefore failed to show “good cause” for their late filing.

Although findings favorable to a petitioner on some or all of the remaining four late-filed factors still may not outweigh the effect of inexcusable tardiness, SLOMFP does not in any event make a compelling showing with respect to those factors. *See Public Service Co. of New Hampshire*, 29 NRC at 70. Petitioner’s interests regarding high-density spent fuel pool storage will be protected through the NRC’s ongoing regulatory oversight of the Diablo Canyon power plant that includes, where appropriate, opportunities to request a hearing (*e.g.*, any license amendment request regarding spent fuel pool issues). As the current proceeding relates to dry cask storage, Petitioner’s participation on spent fuel pool issues cannot reasonably be expected to assist in developing a sound record regarding the licensing of the ISFSI. Finally, allowing SLOMFP to interject issues regarding spent fuel pools into a licensing proceeding for an ISFSI will undoubtedly broaden the proceeding to encompass an entirely new set of issues related to wet storage. Because four of the five factors, including the most important factor — failure to show good cause for late-filing — weigh against admitting the late-filed contention, the proposed contention should not be admitted.

Next, the contention raises an issue — cumulative *risk* — that is different from the concept of cumulative *impacts* contemplated for an EIS. SLOMFP is attempting to extend the cumulative impact concept into an area where it does not apply. Cumulative impact reviews can focus on aggregate impacts of multiple actions, where the environmental impacts are apparent — either qualitatively or quantitatively — and are reasonably certain. In the current context, risk has a probability component. Probabilities do not aggregate. To impose the cumulative impact framework on risk would require a speculative analysis that would compound

supposition upon supposition, leading to unrealistic and therefore meaningless results. Thus, Petitioner's arguments do not raise any genuine issue of cumulative impacts cognizable under NEPA.

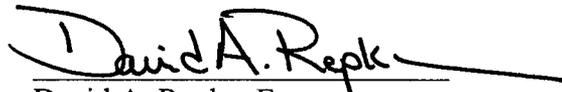
Lastly, to the extent the Petitioner would argue that they are looking for an assessment of the cumulative consequences of a simultaneous assault on the ISFSI and the wet storage pools at Diablo Canyon, they have provided no basis for an assertion that such a scenario is plausible. As a result, the Petitioner has failed to demonstrate a genuine issue within the scope of the ISFSI licensing proceeding.

For all of these reasons, the proposed contention should be rejected as inadmissible.

IV. CONCLUSION

For the reasons discussed above, none of SLOMFP's proposed contentions should be accepted for adjudicatory hearing. The issues raised in proposed Contention 3 and discussed in the report from Dr. Thompson (at pages 33-37) should be treated as a comment during the NRC's NEPA process and should be addressed in the final NEPA documentation.

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Dated in Washington, District of Columbia
this 9th day of July 2007

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of:)
)
Pacific Gas and Electric Co.) Docket No. 72-26-ISFSI
)
(Diablo Canyon Power Plant Independent)
Spent Fuel Storage Installation))

NOTICE OF APPEARANCE

Notice is hereby given that the undersigned attorney herewith enters an appearance in the captioned matter. In accordance with 10 C.F.R. § 2.314(b), the following information is provided:

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Name of Party: Pacific Gas and Electric Company



Tyson R. Smith

Dated in Washington, District of Columbia
this 9th day of July, 2006

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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In the Matter of:)
)
Pacific Gas and Electric Co.) Docket No. 72-26-ISFSI
)
(Diablo Canyon Power Plant Independent)
Spent Fuel Storage Installation))

CERTIFICATE OF SERVICE

I hereby certify that copies of "PACIFIC GAS AND ELECTRIC COMPANY'S RESPONSE TO PROPOSED CONTENTIONS" and "NOTICE OF APPEARANCE" for Tyson R. Smith have been served as shown below by electronic mail, this 9th day of July 2007. Additional service has also been made this same day by deposit in the United States mail, first class, as shown below.

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Washington, DC 20555-0001
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(original + two copies)
e-mail: HEARINGDOCKET@nrc.gov

Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Mail Stop T-3F23
Washington, DC 20555-0001

Office of Commission Appellate Adjudication
U.S. Nuclear Regulatory Commission
Mail Stop O-16C1
Washington, DC 20555-0001

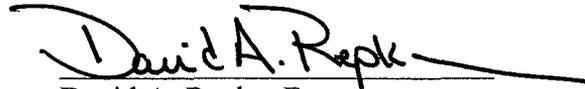
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A handwritten signature in black ink that reads "David A. Repka". The signature is written in a cursive style and is positioned above a horizontal line.

David A. Repka, Esq.
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and Electric Company